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AUTHOR Palmer, Scott R.
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ABSTRACT

This chapter asserts that to make the case for affirmative action in higher education based on the diversity rationale, the legal debate must be reconceptualized into a policy-oriented framework. It presents a model dividing policy development into four interrelated parts: goals, objectives, strategy, and design. The policy framework is applied to the issue of affirmative action in college admissions intended to promote the educational benefits of diversity. The chapter concludes that the policy framework and analysis make a strong case for affirmative action in university admissions intended to further several core goals (improving learning, enhancing civic values, and promoting preparation for employment). This requires substantial commitment from the higher education community. The chapter examines the influence of the Supreme Court's decision in Regents of the University of California v Bakke (1978) and the Fifth Circuit Court's decision in Hopwood v. Texas (1996). It concludes with steps the higher education community must take to build its case for nonremedial affirmative action in higher education, including: evaluate more rigorously the value of student racial diversity to higher education's educational goal and explain clearly higher education's vision concerning the value of racial diversity in higher education and the role and function of affirmative action. (Contains 108 endnotes.) (SM)

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CHAPTER 2

A Policy Framework for Reconceptualizing the Legal Debate Concerning Affirmative Action in Higher Education

SCOTT R. PALMER

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Harvard Univ. Civil Rights Project

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Introduction

The U.S. Supreme Court has established that all race-based affirmative action programs are subject to "strict scrutiny" and will be upheld only where there is a sufficient "basis in evidence" to support the belief that the given program serves a "compelling interest" and is "narrowly tailored" to achieve that interest.[1] Based on Justice Lewis Powell's opinion in *Regents of the University of California v. Bakke*,[2] a number of colleges and universities are currently implementing affirmative action programs to serve, in whole or part, their interest in promoting the educational benefits of diversity.[3] However, several key issues remain unsettled regarding the application of the strict-scrutiny standard to the case of nonremedial affirmative action in higher education.[4] For example: Can a university's interest in promoting educational diversity constitute a compelling interest? What does a narrowly tailored affirmative action program look like? What evidence is necessary and sufficient to justify nonremedial affirmative action?

This chapter asserts that in order to evaluate and make the case for affirmative action in higher education based on the diversity rationale, it is essential first to reconceptualize the legal debate into a policy-oriented framework. The model presented here is simple: "Policy development" can be divided into four interrelated parts—goals, objectives, strategy, and design, each of which is linked to the next by evidence and analytical presumptions.[5] As used here:

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- Goals are the broad, non-operational interests that drive policy choices;
- Objectives are concrete, operational aims that promote the broader goal(s);
- A strategy is a general plan of action designed to achieve the desired objective(s) and thereby promote the broader goal(s); and
- Design is a detailed statement of the strategy.

Understood in these terms, promoting racial diversity in higher education is not an end in itself; rather, it is an objective designed to further various goals of higher education. It is those goals that a court must examine to determine if they are sufficiently "compelling" to justify affirmative action. In order to achieve the objective of racial diversity, a university may institute a given strategy, such as race-based affirmative action in student admissions, which in turn has a certain design, such as a "plus-factor" design in which race is considered as one factor among many in the admissions process.

Using this policy framework to reconceptualize the legal debate concerning nonremedial affirmative action in higher education can help clearly identify the arguments in support of affirmative action based on the diversity rationale and highlight what needs to be done to make those arguments most effectively.[6] In particular, the framework can help clarify the legal issues on which social science and other evidence regarding the benefits of diversity would be most valuable.

This chapter applies the policy framework described above to the issue of affirmative action in university admissions designed to promote the educational benefits of diversity. The chart below summarizes the analysis that follows. Based on that analysis, I conclude that there is a strong case to be made for affirmative action in higher education based on the diversity rationale, but more needs to be done by the higher education community both to use the resource of educational diversity more effectively and to evaluate it more rigorously.

The Goals of Higher Education

In the Supreme Court's 1978 decision in *Regents of the University of California v. Bakke*,[7] Justice Powell's opinion declared that a university's interest in securing the educational benefits of diversity is sufficiently compelling to support affirmative action in university admissions.[8] Nearly twenty years later, in *Hopwood v. Texas*,[9] the U.S. Court of Appeals for the Fifth Circuit rejected *Bakke*'s diversity rationale, without fully considering the

A Policy Framework for Conceptualizing the Case for Nonremedial Affirmative Action in Higher Education Admissions Based on *Bakke*'s Diversity Rationale

The Model	*I*	*II*	*III*
Goals of Higher Education • Which goals, if any, are likely compelling, alone or in combination?	Improve student learning	Enhance students' civic values	Promote students' preparation for employment
Evidentiary Links • What evidence is likely necessary to link the objective to the goal?	Evidence showing that racial diversity can improve learning outcomes, including broader and deeper understanding of substantive issues and/or enhanced critical thinking and problem-solving skills	Evidence showing that racial diversity can improve civic outcomes, including improved racial attitudes (e.g., reduced stereotypes, increased tolerance) and/or improved intergroup relations (e.g., openness toward integration)	Evidence showing that racial diversity can enhance economic outcomes, including improved ability to work effectively in diverse environments and/or to understand the value of diverse perspectives
Objective • What level of racial diversity is likely necessary?	Racial diversity in the student body, including a critical mass of students from different racial backgrounds	Racial diversity in the student body, including a critical mass of students from different racial backgrounds	Racial diversity in the student body, including a critical mass of students from different racial backgrounds
Strategy • Are race-based strategies necessary?	Race-based affirmative action in admissions	Race-based affirmative action in admissions	Race-based affirmative action in admissions
Design • Are individualistic values being upheld?	Race used as "plus factor" in admissions process	Race used as "plus factor" in admissions process	Race used as "plus factor" in admissions process

relevance of racial diversity to the various goals of higher education. The *Hopwood* court often seemed to consider all nonremedial uses of affirmative action to be equivalent to the use of race for race's sake. Thus the court said, "[W]e see the case law as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of a number of factors, is unconstitutional."[10]

Clearly, a university's use of affirmative action to foster racial diversity must serve some goal beyond the achievement of diversity itself. That much was clear from *Bakke*.[11] Racial diversity in the student body is not an end in itself; it is an objective that is sought because it is believed to serve several core goals of higher education, including goals related to improving educational outcomes for all students. Once again, it is those goals that a court must judge to determine if they are sufficiently compelling to justify affirmative action.

Several potentially compelling nonremedial goals of higher education may be enhanced by promoting racial diversity in a university's student body. Per Justice Powell's opinion in *Bakke*, the primary nonremedial justification for affirmative action in higher education is the interest in promoting the educational benefits of diversity, which can be divided into three potentially compelling goals:[12]

1. Improving student learning—enriching the learning environment by providing diverse perspectives that can improve students' understanding of substantive issues and/or enhance students' critical thinking and problem-solving skills;
2. Enhancing students' civic values—bringing students together in ways that can improve racial attitudes, strengthen intergroup relations, and prepare students to function as good citizens and leaders in our multicultural, democratic society; and
3. Promoting students' preparation for employment—improving students' professional development by teaching them the value of diverse perspectives and how to function effectively in diverse business settings and the expanding global marketplace.

Other potentially compelling nonremedial goals also exist and are discussed briefly below, but they are not the primary focus of this chapter. For example, racial diversity may, in some cases, promote the goal of remedying the lack of essential-service providers in society—producing well-educated professionals to practice in underserved communities—and/or the goal of remedying racial stratification in society—producing well-educated minority graduates to serve at advanced levels of society. These goals are somewhat different than the three educational goals itemized

above, which emanate directly from *Bakke*'s diversity rationale. These last two benefits do not flow from students' interactions with persons from different racial and ethnic backgrounds per se, but generally from the inclusion of minority students at selective universities.

Whether any or some combination of these goals is sufficiently compelling to justify affirmative action logically depends, in part, on the importance of the goal(s) to the mission of the given institution of higher education and to society. However, even if one or more of the above goals is potentially compelling, courts will likely uphold affirmative action only where there is a sufficient "basis in evidence" linking the objective of promoting racial diversity to the goal(s). This evidentiary requirement likely serves the related purposes of demonstrating that affirmative action is legitimately necessary to promote the articulated, potentially compelling goal(s) and ensuring that the articulated goal(s) is not merely a pretext for discrimination.[13]

It is unclear how much and what kind of evidence is necessary to meet this evidentiary requirement. Nonetheless, several factors arguably weigh in favor of universities in their efforts to present sufficient evidence of the educational value of diversity. For example:

- The First Amendment concept of academic freedom recognizes that it is chiefly the university's place "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[14] Educators are appropriately due some deference in their educational judgments regarding the value of diversity.
- While universities must present evidence of the value of diversity, the ultimate burden of proof remains with the plaintiff(s) challenging a university's affirmative action program to prove that it violates his/her equal protection rights.[15]
- How much and what kind of evidence is required under the strict-scrutiny standard may depend, in part, on what evidence is available.[16]

The higher education community has long believed that diversity in a university's student body, including racial diversity, is a vital tool for providing students with a complete educational experience,[17] but, until recently, comparatively little had been done to prove the value of diversity. Several recent studies and other efforts show meaningful, positive results, and others are under way. To strengthen the case for nonremedial affirmative action, however, the higher education community likely must develop additional evidence that racial diversity can, when used effectively, promote the potentially compelling educational benefits identified

above. Several types of research may provide valuable evidence of the educational benefits of diversity, including opinion evidence (e.g., testimony from education leaders and survey evidence from students and faculty regarding the benefits of diversity), programmatic evidence (e.g., qualitative descriptions of promising practices that institutions are implementing to promote the benefits of diversity), and outcome evidence (i.e., studies showing the educational outcomes that can result from learning in diverse versus homogeneous environments).

The remainder of this section explores in greater detail each of the above goals of higher education and its evidentiary link to the objective of promoting racial diversity. The section also references some examples of evidence supporting each link, including the studies presented in this volume, but it is not intended to be a comprehensive review of the research literature.[18] Finally, this section considers which, if any, of the above goals are likely to be considered "compelling" by the Supreme Court. The Court has offered little guidance concerning precisely what the term "compelling interest" means.[19] Nonetheless, it is possible to glean some general principles from the Court's jurisprudence and to reach tentative conclusions with regard to the goals identified above.

1. Improving Student Learning

One core goal of higher education that may be served by promoting racial diversity in student admissions is the goal of improving student learning. As Justice Powell recognized in *Bakke*, "People do not learn very much when they are surrounded only by the likes of themselves."[20] Diversity in a university's student body, including racial diversity, can promote substantive teaching and learning, both in and out of the classroom, by exposing students to a variety of perspectives on many subjects, thereby increasing their breadth and depth of knowledge on those subjects, and by challenging students' existing perspectives, thereby enhancing their critical-thinking and problem-solving skills. Racial diversity, therefore, benefits all students by providing them with a more complete educational experience.[21]

The most common criticism levied against this interest in the affirmative action context is that it equates race with viewpoint: As the Fifth Circuit asserted in *Hopwood*, "To believe that a person's race controls his point of view is to stereotype him."[22] But this criticism misses the point. The belief here is not that a person's race controls his/her viewpoint, but rather that a person's race may affect his/her background and life experience and, in turn, his/her perspective on certain issues.[23] This does not stereotype a person any more than the belief that where a person was

born and raised may have a similar effect. In a sense, what is at issue is not racial diversity at all, but experiential diversity: "The variety of viewpoints that the University seeks to foster does not come from any innate difference between the races themselves, but rather from the varying life experiences of the individual, due in large part to their racial backgrounds."[24] And this experiential diversity can enrich the learning environment. "Students 'come to "understand" primarily on the basis of their own reflecting experience, into which they seek to incorporate the new ideas they encounter in their courses.' Because their experiences determine their frame of reference, minority students bring the influence of these experiences to assignments and discussions."[25]

The Fifth Circuit in *Hopwood* seems to deny the role of race in society—stating that race is no more relevant than blood type.[26] But blood type, unlike race, is in no way correlated with such factors as educational opportunity, socioeconomic status, or the nature of interpersonal relations in our country.[27] The Fifth Circuit may wish that there were not racial differences in society, but it cannot deny reality: "One must be careful to distinguish between issues of is and ought."[28] And if the court's goal is to delegitimize racial differences in society,[29] the question from the perspective of university admissions is, what is more likely to facilitate that goal—allowing students of different races to interact in the university marketplace of ideas or limiting such interaction by disallowing affirmative action in student admissions?

A second criticism that may be lodged against the use of affirmative action to further the interest in improving student learning is that it relies on a faulty pedagogical premise: The university is a place where faculty teach students, not where students teach students.[30] But this criticism, too, is flawed. First, substantial evidence indicates that teaching and learning at universities occurs not only between faculty and students but also among students themselves.[31] Second, the role of faculty is to constantly discover as well as to share knowledge, and "[these] functions of discovering and sharing knowledge are intimately related."[32] Third, apart from teaching and learning in the classroom, "[a] great deal of learning occurs informally."[33] Finally, even if it were true that only faculty teach students, it is widely believed that student-centered teaching (e.g., discussion sections in college, the Socratic method in law school, the case method in business school) can improve the overall educational experience. "In the classroom, professors can use the backgrounds and experiences of other students as a learning tool."[34]

To sustain affirmative action based on this potentially compelling goal of improving student learning, institutions will likely be required to

produce evidence linking racial diversity in a university's student body to enhanced learning outcomes. This evidence would likely include studies showing that greater learning, including greater breadth and depth of knowledge on substantive issues and/or improved critical-thinking and problem-solving skills, can be achieved in racially diverse environments compared to racially homogeneous environments. Studies showing a direct link between racial diversity and improved teaching and learning are likely hard to produce. Nonetheless, several recent and encouraging attempts have been made. These studies illustrate that racial diversity, when used effectively, can promote positive learning outcomes.

For example, several recent longitudinal studies based on institutional and nationwide student survey data show positive correlations between increased cross-racial student interactions and various learning outcomes. For example, a study by Patricia Gurin found, "Students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."[35] In addition, Mitchell Chang's study, published in this volume, finds that increased cross-racial student interactions have direct and/or indirect positive effects on such educational outcomes as student retention, satisfaction with college, and intellectual and social self-concept.[36] Other longitudinal studies have shown similar results.[37]

Other forms of testimonial and survey evidence are also probative, including surveys of faculty and students. Many education leaders have spoken in support of the educational benefits of diversity.[38] For example, Neil Rudenstine, president of Harvard University, in an essay that appears in this volume, said:

> [I]t is . . . important that we remember the most fundamental rationale for student diversity in higher education: its educational value. Students benefit in countless ways from the opportunity to live and learn among peers whose perspectives and experiences differ from their own. A diverse educational environment challenges them to explore ideas and arguments at a deeper level—to see issues from various sides, to rethink their own premises, and to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with opposing views.[39]

In addition, several recent surveys of university faculty indicate strong support for the belief that racial diversity is important to the mission of their institutions and that diversity promotes various learning op-

portunities and outcomes, such as broadening the variety of experiences shared in class and encouraging students to examine their own perspectives.[40] For example, in a recent case study regarding faculty attitudes toward diversity at Macalester College, reported in this volume, Roxane Harvey Gudeman found that more than 60 percent of faculty agree that racial diversity promotes such learning benefits as broadening the issues and perspectives discussed in class (though opinions were strongest among faculty that focused on or taught about race or ethnicity).[41] Furthermore, in a recent survey of students at Harvard Law School and the University of Michigan Law School, reported in this volume, Gary Orfield and Dean Whitla found that the vast majority of students believe that racial diversity has enhanced learning experiences, such as "how you and others think about problems and solutions in classes."[42] Moreover, approximately 90 percent of students surveyed consider racial diversity to be either a moderately or clearly positive element in their educational experience.[43]

Some studies have measured the effects of diversity on teaching and learning at a more micro-level. For example, a study by Maurianne Adams and Yu-hui Zhou-McGovern found that participation in an undergraduate social diversity course with a racially diverse student enrollment had a statistically significant, positive effect on students' cognitive development based on tests administered before and after the semester.[44]

Furthermore, the premise that racial diversity in the student body improves student learning can perhaps also be established by analogy through existing research related to the benefits of diverse work groups. "Studies have shown that work team heterogeneity promotes critical strategic analysis, creativity, innovation, and high-quality decisions."[45] Therefore, it can be argued that racial diversity in the higher education context can enhance group analysis and thereby improve teaching and learning on many issues, at least in student-centered learning environments.

Finally, there is the question of whether this interest in promoting teaching and learning, which is a central part of the educational diversity endorsed by Justice Powell in *Bakke*, is likely to be found "compelling" by the Supreme Court today. This issue can perhaps best be examined by considering the likely view of each Justice. Justices Antonin Scalia and Clarence Thomas and Chief Justice William Rehnquist are unlikely to find this interest to be compelling. Justices Scalia and Thomas have indicated that they favor full race neutrality,[46] and Chief Justice Rehnquist shows no signs of favoring the diversity rationale.[47] Justice John Paul Stevens, however, clearly supports educational diversity as a compelling interest.[48] Furthermore, while the views of Justices David Souter, Stephen Breyer,

and Ruth Bader Ginsburg are somewhat less known, their dissents in *Adarand v. Pena* and other writings clearly evidence a rejection of strict race neutrality and potential support for educational diversity as a compelling interest.[49]

The apparent swing votes, therefore, on the Court in 2000, are Justice Sandra Day O'Connor and, to a lesser extent, Justice Anthony Kennedy, whose views are somewhat difficult to discern. Both justices have on occasion advocated race neutrality.[50] Justice O'Connor, joined by Justice Kennedy and others, authored the main dissent in *Metro Broadcasting, Inc. v. FCC*, which suggested that only the remedial interest in overcoming the present effects of past discrimination could ever constitute a compelling interest.[51] Nonetheless, there are clear differences between the broadcast diversity at issue in *Metro* and the interest in improving student learning in the higher education context, which might cause Justice O'Connor to reach a different result in the latter context.[52] Furthermore, Justice O'Connor's prior opinions indicate some level of support for educational diversity.[53] Finally, in *Adarand*, Justice O'Connor avoided repudiating *Bakke*, indicated that strict scrutiny is not "fatal in fact," and, joined only by Justice Kennedy, reaffirmed her belief in the importance of precedent.[54] This last point concerning the importance of precedent may be especially important for the future of nonremedial affirmative action in higher education under *Bakke*'s diversity rationale:

> *Adarand* teaches us a valuable lesson about Justices O'Connor and Kennedy. . . . Joined . . . only by Justice Kennedy, [Justice O'Connor] carefully crafted one section of *Adarand* in light of her 1992 [*Planned Parenthood v.*] *Casey* opinion (coauthored with Justices Kennedy and Souter), which cautioned against overruling hugely important cases around which major social expectations have crystallized. . . . Thus a big "plus" for *Bakke* [and its interest in improving student learning] is its social importance. An entire generation of Americans has been schooled under *Bakke*-style affirmative action. . . . Only a handful of modern Supreme Court cases are now household words in America. But *Bakke*—like *Brown* and *Roe*—is surely one of them.[55]

Given this analysis, there is likely a strong case to be made for affirmative action in higher education based on the interest in improving student learning, though more needs to be done to fully develop that case.

2. Enhancing Students' Civic Values

Another educational goal that may be furthered by promoting racial diversity in a university's student body is the goal of enhancing students'

civic values. Education has long been viewed in our democratic society as "the very foundation of good citizenship."[56] "[M]uch of the point of education is to teach students how others think and to help them understand different points of view—to teach students how to be sovereign, responsible, and informed citizens in a heterogeneous democracy."[57] The theory here is that by bringing together and promoting constructive interactions among students from diverse racial and ethnic backgrounds, universities can help break down racial fears and stereotypes and cultivate the values of tolerance, justice, and respect for others that make all students better citizens:

> If a far-flung democratic republic as diverse—and at times divided—as late twentieth-century America is to survive and flourish, it must cultivate some common spaces where citizens from every corner of society can come together to learn how others live, how others think, how others feel. If not in . . . universities, where? If not in young adulthood, when?"[58]

Evidence linking racial diversity in the student body to the goal of enhancing civic values would likely include research demonstrating that students who study in racially diverse environments can be more likely to develop positive racial attitudes and to more fully embrace our multicultural democracy. "National studies dealing with changes during the college years in attitudes and values related to civil rights, civil liberties, racism, anti-Semitism, or general tolerance for nonconformity uniformly report shifts toward social, racial, ethnic, and political tolerance and greater support for the rights of individuals in a wide variety of areas."[59] Less evidence, however, has focused directly on the question of whether racial diversity itself can promote such outcomes. Nonetheless, some important research does exist, and additional evidence is being developed.

This evidence includes longitudinal studies linking racial diversity to several civic outcomes. For example, Patricia Gurin found:

> Students who experienced diversity in classroom settings and in informal interactions showed the most engagement during college in various forms of citizenship, and the most engagement with people from different races and cultures. They were also the most likely to acknowledge that group differences are compatible with the interests of the broader community. These effects continued after the students left the university setting. Diversity experiences during college had impressive effects on the extent to which graduates in the national study were living racially and ethnically integrated lives in the post-college world.[60]

Furthermore, Alexander Astin found that increased student diversity experiences, as well as increased faculty and institutional commitment to diversity, were positively associated with such civic outcomes as increased cultural awareness among students and/or increased student commitment to promoting racial understanding.[61] Moreover, a recent study by Sylvia Hurtado, which is included in this volume, found that students who studied with someone from a different racial or ethnic background reported positive growth in such civic outcomes as "the acceptance of people of different races/cultures, cultural awareness, tolerance of people with different beliefs, and leadership abilities."[62]

These longitudinal findings are supported by additional survey evidence. For example, in a recent study by William Bowen and Derek Bok, the vast majority of black and white graduates surveyed said that attending a racially diverse college helped improve their ability "to work effectively and get along well with people from different races."[63]

Some important studies also have looked specifically at the long-term effects of diversity on civic outcomes. For example, in a recent report summarizing lessons from school desegregation research, which is published in this volume, Janet Ward Schofield indicates that students who attend desegregated schools are more likely to live and work in integrated environments as adults.[64]

In addition, the link between racial diversity in the student body and the goal of inculcating civic values can perhaps be established through existing research demonstrating that interactions among different types of people can, in certain circumstances, promote tolerance and understanding. This theory is widely known as the "contact hypothesis," which states that "contact with members of a negatively stereotyped group might ameliorate attitudes both toward the specific group member or members with whom contact occurred, and toward the group as a whole."[65] Numerous studies have provided support for the contact hypothesis if certain conditions are met. These conditions include that 1) the interaction occur between persons of equal status, 2) the interaction afford persons the chance to get to know each other, and 3) the interaction be cooperative and in pursuit of mutual goals.[66] Therefore, the contact hypothesis likely lends support for the role of racial diversity in promoting such civic values as racial tolerance and understanding, provided that universities make the commitment to foster cross-racial, cooperative learning opportunities.

Finally, there is the question of whether this civic interest is likely to be found compelling. The goal of enhancing civic values is at the heart of *Bakke*'s diversity rationale and is often analyzed as part of the interest in

improving student learning described above. Therefore, the prior analysis of the likely views of each justice concerning whether the interest in student learning is "compelling" likely applies here as well. However, these interests are properly disaggregated to point out an important difference: Unlike the student learning interest, the civic interest does not necessarily depend on judgments about individuals' viewpoints. In other words, even if the lesson that students of different races learn from interacting with each other in a university setting is that there is no viewpoint correlated with race (i.e., that students from different racial backgrounds do not in fact see any issues differently in any consistent way), that would likely be an extremely valuable lesson toward instilling students of all races with the tolerance and understanding necessary for them to function as good citizens in our multicultural, democratic society. As Justice Stevens explained in *Wygant v. Jackson Board of Education*, referring to the value of racial diversity in school faculty:

> In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.[67]

This distinction could make a difference to Justice O'Connor, who in her *Metro* dissent indicated her opposition to affirmative action programs that are based on the assumption that a person's race determines how he or she thinks.[68] As explained above, I believe that this criticism concerning race and viewpoint misunderstands the relevance of racial diversity in the higher education context. Nonetheless, to the extent that the criticism can be avoided, the case for the goal of enhancing civic values as a compelling interest may be even stronger than that for improving student learning.

3. Promoting Students' Preparation for Employment

A third educational goal that may be served by promoting racial diversity in a university's student body is the interest in preparing students for future employment. The theory behind this economic interest is that racial

diversity in higher education is a vital tool for promoting students' professional development by teaching them the value of diverse perspectives and how to work and communicate effectively with persons from different backgrounds.[69] This interest likely grows more important as business environments become more diverse, the domestic marketplace becomes more diverse, and the global marketplace expands. "As the population of the country becomes ever more diverse, . . . the need to work effectively with individuals of other races will become an increasingly inescapable reality to members of every racial group."[70] In short, racial diversity in higher education can make all students more qualified for future employment by preparing them for success in an increasingly diverse business world.

Evidence linking racial diversity in the student body to the goal of improving students' professional development would likely include studies showing that employers value employees who have "cross-cultural competencies" and that graduates of diverse universities are more comfortable, effective, and successful working in diverse business environments.

There is growing evidence from the business arena that employers value diversity and persons able to function effectively in diverse environments.[71] This is based, in part, on evidence that diverse work groups, including racially diverse groups, can promote greater problem solving (i.e., generate ideas that are more creative, effective, and feasible) than homogenous groups, but only when those heterogeneous groups are able to be managed effectively.[72] Furthermore, evidence from several studies shows that students who learn in diverse environments are more likely to choose to work in diverse business settings.[73] Finally, a recent study by Kermit Daniel, Dan Black, and Jeffrey Smith, which is published in this volume, presents preliminary evidence that attending a college with a more diverse student body may have a positive effect on the future wages of both black and non-black men, though diversity seems to have a lesser effect or no effect on the future wages of women.[74] This suggest that there may be a market value to learning in diverse environments.[75]

In many ways, the value of diversity in promoting students' preparation for employment is an extension of the benefits of improved student learning and enhanced civic values discussed above, for it relies on the belief that students will take the lessons learned from educational diversity on campus into the workplace. Therefore, evidence related to the value of diversity in promoting teaching and learning and enhancing civic values should be relevant here as well. This relationship among the educational benefits of diversity extends to the question of whether the goal of promoting student's preparation for employment is likely to be found com-

pelling by the Supreme Court. Given the strong case that can be made for both the teaching and learning and civic values rationales, there is likely a strong case to be made for the goal of enhancing students' professional development as a compelling interest that can justify affirmative action, but more needs to be done by both the higher education and business communities to develop that case.

4. Other Potentially Compelling Goals

On a different level than the three educational goals described above, which emanate from Justice Powell's opinion in *Bakke*, promoting the inclusion of racial minorities at selective universities may serve other potentially compelling, nonremedial interests, two of which I will discuss briefly.

First, racial diversity may promote the potentially compelling goal of producing well-educated professionals to practice in underserved areas. Significantly, the achievement of this goal is not based on the interaction among students of different races. In fact, this interest is not really concerned with the race of students at all. Rather, the theory here is that promoting minority enrollment will remedy the lack of essential-service providers, such as medical professionals, in underserved communities because such communities tend to be largely minority communities and minority graduates are more likely to practice in those communities.

Evidence linking the objective of racial diversity to the goal of remedying the lack of essential-service providers in society would likely include evidence that there is a lack of certain types of professionals practicing in certain communities and that minority professionals are more likely to practice in those areas. Such evidence does exist for some fields.

The most apparent example is the medical profession, which was at issue in *Bakke*. There is substantial evidence of disparities regarding access to physicians in certain segments of society.[76] While there are such shortages in poor communities regardless of race, studies indicate that "[t]he supply of physicians was much more strongly associated with the proportion of black and Hispanic residents in the community areas than with the areas' income level."[77] Furthermore, studies show that black and Hispanic medical school graduates are significantly more likely to practice in these underserved areas.[78] A recent study by Timothy Ready, included in this volume, provides an overview of several studies showing that minority physicians are more likely than white physicians to work in disadvantaged and/or predominantly minority communities.[79] Therefore, affirmative action in medical school admissions would likely further the goal of facilitating health care to all citizens.

This interest may be compelling in some circumstances where the need for certain service providers is itself compelling. For example, in *Bakke*, Justice Powell suggested that the state's interest in "facilitating the health care of its citizens" by expanding health services in underserved communities was arguably compelling enough to justify the use of race-based affirmative action at Davis Medical School, but Justice Powell rejected the interest in large part because there was no evidence that minority graduates were more likely to practice in such underserved communities.[80] Such evidence now exists. However, affirmative action programs designed to promote this interest may be unlikely to withstand strict scrutiny for a different reason—there may be race-neutral means available to further this goal (i.e., the program would not be necessary or narrowly tailored). For example, a university could reserve admissions slots for students who pledge to practice in underserved communities after graduation. Therefore, the question of whether this goal is compelling may be moot. On the other hand, evidence that such efforts are not likely to produce lasting solutions could be important. To the extent that race-neutral means are not likely to be effective, race-based means could be justified.

Second, promoting the inclusion of racial minorities at selective universities may serve the goal of remedying racial stratification by producing well-educated minorities to serve at advanced levels in society. This interest rests in part on the notion that universities are prime forces of social mobility and can, therefore, help overcome racial stratification in society. However, this interest may also have an instrumental component: The theory here is that it may be appropriate to use affirmative action to admit minority students to study in certain fields because there is a compelling interest in having a sufficient number of minority graduates in certain positions in society.

In part, evidence linking racial diversity to the goal of remedying racial stratification would include evidence that increasing minority representation in higher education can help overcome gaps in society. There is ample evidence that higher education is a major force for overcoming racial disparities. For example, there is substantial evidence that obtaining a college degree promotes greater earnings, and that this effect is even greater for persons of color than for whites.[81] A recent study by Kermit Daniel, Dan Black, and Jeffrey Smith, included in this volume, found that attending a high-quality college has a positive effect on the future wages of blacks that is approximately three time greater than the effect on wages of non-blacks.[82] Yet despite this evidence, it may be unlikely that the present Supreme Court would find that universities are the appropriate actors

to decide to use affirmative action to pursue this goal of remedying racial stratification, which seems akin to the goal of remedying societal discrimination.

However, as stated above, there may be specific cases where evidence shows that increasing the number of minorities serving in select positions in society has an instrumental value that is itself compelling, and where universities are so closely connected to producing individuals to serve in those positions that affirmative action would be justified. Consider, once again, the medical profession. It is clear that there is an underrepresentation of minority physicians in society.[83] Furthermore, there may be an instrumental value to having a sufficient number of minority physicians in society (not to be confused with the interest discussed above in providing underserved communities with physicians of any race) to ensure the highest quality care for persons of color.[84] Thus, it is possible that affirmative action in medical school admissions could be necessary to promote this goal.[85]

But how would the Supreme Court view this interest? It is highly unlikely that the Court would permit universities to use affirmative action solely to promote the social mobility of persons of color. That interest is largely akin to the interest in overcoming "societal discrimination," which the Supreme Court has clearly indicated is not sufficiently compelling to justify affirmative action by any entity except perhaps the federal government.[86] Even where there is an instrumental value to the promotion of minorities in a given field, the use of affirmative action may raise concerns for the Court. This justification promotes a largely pluralistic view of society in which persons of different races are best served by persons of their same race. This runs contrary to American principles of individualism and to much of the Supreme Court's jurisprudence on race. Nonetheless, this interest may be worth pursuing in defense of a university's affirmative action program in specific circumstances where there is a particularly compelling need for minority professionals and a close connection between the education an institution provides and the availability of such professionals in society.[87]

Objective of Promoting Racial Diversity

In the case of nonremedial affirmative action in university admissions, the objective is promoting racial diversity in the student body, which most often means increasing minority representation at predominantly white universities. However, vague objectives, such as "promoting racial

diversity," are sometimes detrimental because they lead to confused, imperfect policy choices.[88] What makes an objective "operational" is that it is defined precisely enough so that it is easy to understand what is expected and to determine whether the objective has been achieved. In the case of affirmative action in university admissions, this need to clearly articulate a policy's objective raises additional questions — most importantly, exactly what level of racial diversity is appropriate?[89]

The proper level of diversity a university should pursue necessarily depends on what goal(s) of higher education the university is trying to promote. For example, if the goal is remedying racial stratification in society, then the appropriate level of diversity is likely tied to existing gaps in society. This conclusion illustrates why it is unlikely that the goal of remedying racial stratification will be found to be compelling in most cases. Promoting this interest would permit a discrete university to use affirmative action to admit any number of minority applicants it believed appropriate until societal discrimination was remedied, a situation the Court has rejected.[90]

However, if the goals that a university is seeking to serve are the educational goals of improving teaching and learning, enhancing civic values, or improving professional development among its students, then the appropriate levels of diversity are tied to the levels necessary to achieve those goals by promoting discussions and interactions among students of different races. In other words, some "critical mass" of minority representation is likely necessary to create sufficient opportunities for communication and interactions across racial lines. Furthermore, there is some evidence that minority student participation and interactions across racial lines are dependent, in part, upon the level of comfort minority students feel on campus.[91] A critical mass of students from a given minority group may increase the level of comfort that students from that group feel on campus by providing a community base.[92] Finally, studies show that increasing campus diversity leads to increased cross-racial interactions. For example, a study by Chang, which appears in this volume, shows that increased diversity on campus is positively correlated with the establishment of interracial friendships, even when controlling for student and campus characteristics.[93]

Given the limited, though growing, number of studies concerning the educational value of diversity and the fact that institutional missions and circumstances will vary, we cannot know what level of minority enrollment is optimal to benefit all students. However, there seems to be some agreement between proponents and opponents of affirmative ac-

tion that tokenism is likely insufficient to realize the educational benefits of diversity and that proportionality in racial representation is not necessarily required to further those educational goals.[94] Between those extremes is a range within which educators are likely due some deference concerning the level of diversity that is optimal to fulfill their educational goals.

Strategy of Affirmative Action

The strategy at issue here is race-based affirmative action in student admissions. It is the use of this race-based strategy that implicates strict scrutiny and requires universities to show that the strategy is narrowly tailored to serve a compelling interest.[95] The compelling interest prong was addressed above. The narrowly tailored prong requires, in part, that the race-based strategy of affirmative action be necessary in the sense that there are no race-neutral means available to achieve the program's compelling interest(s). To the extent that race-neutral means are available, race-based means likely cannot be utilized.

For example, as mentioned above, it may be possible to implement race-neutral means to promote the goal of remedying the lack of essential-service providers in society. A university could, for example, reserve admissions slots for students who pledge to practice in underserved communities after graduation.[96] To the extent that such race-neutral means are effective, race-based affirmative action programs designed to achieve that goal are unlikely to pass strict scrutiny even if the goal is found to be compelling.

However, it is more difficult to see how race-neutral means could effectively achieve the educational goals of improving teaching and learning, enhancing civic values, and improving professional development among all students (assuming these goals are found to be compelling). With regard to each of these goals, the very point is to expose students to persons from different racial backgrounds and/or perspectives. It is unlikely that these goals could be fully achieved without promoting at least some level of racial diversity on campus.[97] Furthermore, evidence indicates that absent intentional efforts to promote the admission of underrepresented minorities to certain selective universities, racial diversity at those institutions would decrease significantly.[98] Therefore, assuming that any of these goals are found to be compelling, affirmative action in student admissions, properly designed, may be a necessary means of achieving that goal.

Design of Race as "Plus Factor"

In the case of nonremedial affirmative action in university admissions, the legally required design is dictated by Justice Powell's decision in *Bakke*. In order for a university's affirmative action program to pass constitutional muster, it must avoid racial quotas and seek to promote a broad-based, individualistic notion of diversity in which race is "but a single though important element."[99] In other words, race may only constitute a single plus factor in a particular candidate's file along with other factors designed to promote diversity in other important dimensions. Admissions programs that do not follow this design will not likely pass strict scrutiny.

It is perhaps appropriate to inquire whether this design of affirmative action, where race is just one element of diversity among many, can truly result in a racially diverse student body, or whether this individualistic notion of diversity is disingenuous because race is really the predominant factor in student admissions. The evidence indicates that while race is only one factor in admissions at selective universities, it is a substantial factor in some cases. According to one study, at those selective universities with average SAT scores in the top 20 percent of all four-year institutions, black and Hispanic applicants were found to be 8–10 percent more likely to be admitted than white students with similar qualifications.[100] "This differential was as large as that associated with having an "A–" average in high school rather than a "B" or having an SAT score of 1400 rather than 1000."[101]

However, for several reasons, this does not necessarily undercut *Bakke*'s plus-factor design. First, the primary factor in admissions at highly selective universities is always academic ability (i.e., all students admitted, through affirmative action or otherwise, come from the pool of qualified candidates).[102] Second, it is clear that universities seek to promote diversity in student admissions based on multiple factors in addition to race (e.g., geographic diversity),[103] but many of these factors are likely well represented at all levels of qualified students. Therefore, a university may not have to take as substantial affirmative action to achieve diversity with regard to most of these characteristics. Third, universities do give substantial weight to other particularistic factors beyond race in student admissions. The most obvious example is alumni preferences, which evidence indicates are often more substantial than race-based preferences at selective universities.[104] Finally, race is likely given substantial weight in admissions at selective universities when choosing among qualified applicants because racial diversity is viewed by educators as an important resource for achieving the goals of higher education.

Conclusion

The above policy framework and analysis indicate that there is likely a strong case to be made for affirmative action in university admissions designed to promote the objective of increasing racial diversity in the student body to further several core goals of higher education, specifically the educational goals of improving student learning, enhancing students' civic values, and/or promoting students' preparation for employment. However, making the case for affirmative action in higher education will require a substantial commitment from the higher education community. For more than 20 years, the higher education community relied heavily on Justice Powell's decision in *Regents of the University of California v. Bakke* to justify affirmative action in higher education. The Fifth Circuit's decision in *Hopwood v. Texas*, and more recent challenges to affirmative action, can be either a clarion call or a death knell.

Based on the above analysis, I conclude that the higher education community must take several steps to build its case for nonremedial affirmative action in higher education.

First, the higher education community must increase efforts to use racial diversity more effectively to further the goals of improving student learning, enhancing civic values, and improving professional development. Racial diversity in the student body is merely a tool or resource. Evidence shows that, like any resource, if such diversity is not used properly and effectively, it is likely to be wasted or even counterproductive. For too long, universities simply provided this complex tool for their students to use without providing guidance on how to use it or creating significant opportunities to do so. This is rapidly changing,[105] but more changes are likely merited. A recent study by Jeffrey Milem, which appears in this volume, indicates that institutions with the greatest diversity are often the least likely to have adopted practices to maximize the benefits of diversity.[106] Further efforts should be taken to formalize the use and benefits of diversity. These efforts could likely include pedagogical changes (such as the enhancement of cooperative learning situations), curricular changes (such as the inclusion of multicultural issues in new and existing courses), and/or extracurricular changes (such as the promotion of community service projects that provide neutral contexts for positive cross-racial interactions).[107] Such efforts would illustrate the institution's commitment to diversity as a means to one or more of the potentially compelling educational goals identified above. Furthermore, such formal programs would create additional opportunities to evaluate the role of diversity in achieving these potentially compelling goals, which leads directly to the next point.

Second, the higher education community must evaluate more rigorously the value of racial diversity in the student body to its educational goals. Universities must have a sufficient basis in evidence to support nonremedial affirmative action. While some significant evidence is available, further social science and other evidence should be developed per the evidentiary links identified above. Such evidence can likely help establish that racial diversity is necessary to promote the educational benefits of diversity and that the use of affirmative action to promote such benefits is not pretextual.[108]

Third, the higher education community must implement affirmative action appropriately and only to the extent necessary to further its articulated nonremedial goals (except where remedial goals are independently justified). This means that universities must make the investment necessary to follow *Bakke*'s "plus factor" design in admissions and must set numerical targets at appropriate levels to achieve its goals, which may mean levels less than proportional representation. If the goals related to promoting the educational benefits of diversity are truly compelling, then universities should be willing to make the commitments and sacrifices necessary to pursue those and only those goals.

Fourth, the higher education community must clearly explain and promote, both on campus and to the public at large, its vision concerning the value of racial diversity in higher education and the role and function of affirmative action in fostering that diversity. Affirmative action faces not only legal challenges, but also political challenges. Building the case for affirmative action means educating and affecting public discourse as well the courts. The primary justification for affirmative action today rests on the educational benefits that accrue to all students from learning in diverse environments, and education leaders can play an important role in ensuring that persons from all racial and ethnic backgrounds fully understand and appreciate those benefits.

Notes

1. See, for example, *Adarand v. Pena*, 515 U.S. 200, 227 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 500 (1989).
2. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
3. Studies show that race is most often a factor in student admissions only at highly selective universities, specifically "those [universities] with average SAT scores in the top quintile of four-year institutions." Thomas Kane, Racial and Ethnic Preference in College Admissions 2 (1997) (conference paper) "[A]t the less exclusive institutions that eighty percent of 4-year college students attend, race plays little if any role in admissions decisions." Id.

4. The distinction between "nonremedial" and "remedial" affirmative action is not absolute. However, remedial affirmative action is based directly on the need to *remedy* past or present discrimination, while nonremedial affirmative action is based on the interest in promoting more forward-looking benefits, including the educational benefits that may accrue to all students from attending diverse institutions of higher education.
5. See Phillip Zelikow, *Foreign Policy Engineering: From Theory to Practice and Back Again*, 18 International Security 143 (Spring 1994) (dividing policy engineering into seven interrelated parts, including the four discussed here).
6. This policy analysis provides a different approach for understanding the application of the strict scrutiny standard to affirmative action in higher education, including the compelling interest and narrow tailoring requirements. It is not, however, meant to cover all aspects of the strict scrutiny standard. For a more complete overview of the law, see Scott R. Palmer, *Diversity and Affirmative Action: Evolving Principles and Continuing Legal Battles*, in this volume.
7. *Bakke*, 438 U.S. 265 (1978).
8. See id. at 312-15 (opinion of Powell, J.). "The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is," Justice Powell wrote, "widely believed to be promoted by a diverse student body." Id. at 312.
9. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).
10. Id. at 945–46 (emphasis added).
11. See *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).
12. See, for example, Patricia Gurin, *Expert Report*, *in* The Compelling Need for Diversity in Higher Education, *Gratz v. Bollinger*, 97-75321, and *Grutter v. Bollinger*, 97-75928 (E.D. Mich. 1997) (identifying three categories of goals supported by racial diversity in the student body—1) learning outcomes, 2) democracy outcomes, and 3) outcomes related to living and working in a diverse society); One America in the 21st Century: Forging a New Future, The Report of the President's Advisory Board on Race 66 (1998) ("Diversity improves teaching and learning by providing a range of perspectives that enrich the learning environment; strengthens students' critical-thinking skills by challenging their existing perspectives; teaches students how to interact comfortably with people different than themselves and thereby how to function as good citizens and neighbors; improves students' preparation for employment by teaching them the value of different perspectives, how to function in diverse business settings, and how to communicate effectively in our increasingly diverse domestic marketplace and the expanding global marketplace; and fosters the advancement of knowledge by spurring study in new areas of concern.").

    The concept of "educational benefits of diversity" is used here as an umbrella encompassing several educational goals that may, individually or in sum, be "compelling." The three goals listed above are interrelated and can be divided in several different ways. In addition, other educational goals may also be relevant to certain forms of diversity in higher education, such as the goal of *promoting the advancement of knowledge*—providing diverse perspectives to stimulate research and writing in new areas of concern.
13. See, for example, Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harvard Civil Rights-Civil Liberties Law Review 381, 407 (1998) ("The main function of strict scrutiny's evidentiary requirements, I argue, is to ensure that racial classifications purportedly adopted for legitimate governmental purposes do not actually stem from invidious, unconstitutional motives.").

14. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)).
15. See, for example, *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277–78 (plurality opinion); id. at 292 (O'Connor, J., concurring).
16. See *Wittmer v. Peters*, 87 F.3d 916, 920–21 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).
17. See, for example, Neil Rudenstine, Report to the Harvard University Board of Overseers, 1993–1995, 33 (January 1996) ("Th[e] conception of a diverse student body as an 'educational resource'—comparable in importance to the faculty, library, or science laboratories—is the most direct expression of an idea that we have seen emerging over the course of more than a century.").
18. For a review of the research literature concerning the value of diversity in higher education, See, for example, Gurin, *supra* note 12, at 151 (Appendix B); Jeffrey Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities (prepublication draft) (1998).
19. See, for example, Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 Boston University Law Review 917, 937 (1988) ("[W]ith few exceptions, the Court has failed to explain the basis for finding and deferring to compelling governmental interests.") Some legal commentators have suggested that the Court has adopted a "know it when I see it approach" to identifying compelling interests, id. (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), and that "compelling, even more than beauty, [may be] in the eyes of the beholder," David Schimmel, *Is Bakke Still Good Law? The Fifth Circuit Says No and Outlaws Affirmative Action*, 113 Education Law Reporter 1052 (1996) (quoting Lino Graglia, Texas Lawyer, Sept. 25, 1995, at 25).
20. *Bakke*, 438 U.S. at 313 (quoting William Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)).
21. See, for example, Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA Law Review 1745, 1749 (1996) ("Integrated education . . . does not just benefit minorities—it advantages all students in a distinctive way, by bringing rich and poor, black and white, urban and rural, together to teach and learn from each other as democratic equals.")
22. *Hopwood*, 78 F.3d at 946.
23. See, for example, The Four Americas: Government and Social Policy Through the Eyes of America's Multi-Racial and Multi-Ethnic Society, Harvard Survey Project 25–37 (Dec. 1995) (illustrating differences in viewpoints by race with regard to several issues). Also see Gary Orfield, *Introduction*, in this volume.
24. Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 95 Annual Survey of American Law 515 (1996).
25. Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 Harvard Law Review 1357, 1370 (1996) (quoting John D. Wilson, Student Learning in Higher Education 29 (1981)). Racially diverse perspectives may, of course, be more relevant to some issues than others. See, for example, Amar & Katyal, *supra* note 21, at 1778 ("Of course, diversity cannot function in the same way, or be as important, in every academic context. There may be settings where diversity may not have much educational importance at all (graduate school in math, perhaps) and other settings where it will matter a great deal (college, for example)."). But at a university, racially diverse perspectives are likely to be relevant to a significant number of subjects and experiences.

26. See *Hopwood*, 78 F.3d at 945.
27. See, for example, Affirmative Action Review: Report to the President 20–25 (July 1995) (presenting evidence of continued racial stratification and discrimination in American society).
28. Adolphous Levi Williams, Jr., *A Critical Analysis of the Bakke Case*, 16 Stanford University Law Review 129, 225 (1989). "However unpleasant it may be, the issue of race is still very much an unresolved issue in the United States. As desirable as it might be to set this issue to one side, pretend it does not exist, or acknowledge its existence and accord it only minimal importance, the historical evidence and realities (for example to small percentage of Afro-American[s] in the professions) lead us in the opposite direction and to another conclusion; specifically, that race must be considered now and in the foreseeable future." Id. at 229.
29. See *Hopwood*, 78 F.3d at 940 (suggesting that the goal of equal protection is to make race irrelevant).
30. This criticism, of course, suggests an important argument in support of non-remedial affirmative action in faculty recruitment to support the educational benefits of diversity. See *University and Community College System of Nevada v. Farmer*, 930 P.2d 730 (Nov., 1997), *cert. denied*, 118 S. Ct. 1186 (1998) (upholding under a Title VII challenge a university's affirmative action plan to promote faculty diversity where there was also a manifest racial imbalance in the work force). But see *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1995) (holding unlawful under Title VII a school board's decision to layoff a white high school teacher rather than an equally qualified black teacher to maintain faculty diversity because only remedial affirmative action programs whose purposes mirror Title VII were deemed lawful).
31. See, for example, Ernest T. Pascarella & Patrick T. Terenzini, How College Affects Students 620 (1991) ("Consistent with evidence on the impact of student-faculty interaction, students' interactions with their peers also have a strong influence on many aspects of change during college. Included are such areas as intellectual development and orientation; political, social, and religious values; academic and social self-concept; intellectual orientation; interpersonal skills; moral development; general maturity and personal development; and educational aspirations and educational attainment.")
32. Nannerl O. Keohane, *The Mission of the Research University*, *in* The Research University in a Time of Discontent 157 (Jonathan R. Cole, Elinor G. Barber, & Stephen R. Graubard eds., 1994).
33. *Bakke*, 438 U.S. at 313 n.48 (quoting Bowen, *supra* note 20, at 9).
34. Note, *supra* note 25, at 1370.
35. See, for example, Gurin, *supra* note 12, at 100.
36. Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, in this volume.
37. See, for example, Alexander Astin, *How Are Students Affected?* 25 Change 44 (1993); Octavio Villalpando, Comparing the Effects of Multiculturalism and Diversity on Minority and White Students' Satisfaction with College (ASHE Annual Meeting Paper) 16 (Nov. 9, 1994).
38. See, for example, Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 William and Mary Bill of Rights Journal 881, 888–89 (1996).
39. Neil L. Rudenstine, *Student Diversity and Higher Learning*, in this volume.
40. See, for example, Richard A. White, *Law School Faculty Views on Diversity in the Classroom and the Law School Community* (Preliminary Report for the American Association of Law Schools) (2000); Geoffrey Maruyama & Jose F. Moreno, *University*

Faculty Views About the Value of Diversity on Campus and in the Classroom (Report for the American Council on Education and the American Association of University Professors) (2000).

41. Roxane Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College*, in this volume.
42. Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in this volume.
43. Id.
44. Maurianne Adams & Yu-hui Zhou-McGovern, The Sociomoral Development of Undergraduates in a "Social Diversity" Course 31 (Paper presented at the Annual Meeting of the American Educational Research Association) (Apr. 1994).
45. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 California Law Review 953, 1024 (1996) (citing L. Richard Hoffman & Norman R.F. Maier, *Quality and Acceptance of Problem Solutions by Members of Heterogeneous Groups*, 62 Journal of Abnormal & Social Psychology 401 (1961)). Of course, not all of the effects of diversity, especially cultural diversity, on problem-solving are positive. "Although culturally diverse groups have the potential to generate a greater variety of ideas and other resources than culturally homogeneous groups, they need to overcome some of the group interaction problems that make group functioning more difficult." Warren E. Watson & Kamalesh Kumar, *Differences in Decision Making Regarding Risk Taking: A Comparison of Culturally Diverse and Culturally Homogeneous Task Groups*, 16 International Journal of Intercultural Relations 53, 61 (1992).
46. See *Adarand*, 115 S. Ct. at 2119 (Scalia, J., concurring in part) ("To pursue the concept of racial entitlement--even for the most admirable and benign purpose--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American."); id. (Thomas, J., concurring in the judgment) ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.").
47. See, for example, Amar & Katyal, *supra* note 21, at 1768 ("William Rehnquist voted for Allan Bakke once, and his writings and opinions reveal no faith in Lewis Powell's diversity theory.").
48. See, for example, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 601–02 (Stevens, J., concurring) ("The public interest in broadcast diversity—like the interest in an integrated police force, diversity in the composition of a public school faculty, or diversity in the student body of a professional school—is in my view unquestionably legitimate.").
49. See *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting, joined by Ginsburg, J.), id. at 2131 (Souter, J., dissenting, joined by Ginsburg and Breyer, J.); id. at 2134 (Ginsburg, J., dissenting, joined by Breyer, J.). Justice Ginsburg's explanation, joined by Justice Souter, concerning the Court's denial of *certiorari* in *Hopwood* is perhaps also evidence of their support for affirmative action in the higher education context. See *Texas v. Hopwood*, 116 S. Ct. 2581 (1996) (indicating that the issue of whether universities can use race as one factor in admissions is "an issue of great national importance" that will be decided another day).
50. See Amar & Katyal, *supra* note 21, at 1757–58, 1769.
51. *Metro*, 497 U.S. at 3028 (O'Connor, J., dissenting).
52. These differences include the unique role of education in society, the special First Amendment protections of academic freedom that may operate in the higher edu-

cation context, the emphasis placed on individualistic diversity in *Bakke* versus the largely pluralistic diversity at issue in *Metro*, the direct interactions among students in a university environment versus the attenuated interactions between owners of broadcast stations and the public, and the fact that Justice Powell upheld educational diversity under strict scrutiny in *Bakke*. See, for example, Amar & Katyal, at 1747 (1996) (offering several potentially salient distinctions between *Bakke* and *Metro*).

53. See, for example, *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial classifications in furthering that interest."); id. at 288 n.* ("The goal of providing 'role models' discussed by the courts below [and rejected by the Supreme Court here] should not be confused with the very different goal of promoting racial diversity among the faculty.").
54. *Adarand*, 515 U.S.
55. Amar & Katyal, *supra* note 21, at 1760–70.
56. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).
57. Amar & Katyal, *supra* note 21, at 1774.
58. Id. at 1749. See also Robert Post, *Introduction: After Bakke*, *in* Representations 1 (Summer 1996) ("Institutions of higher education are today a primary source of . . . cultural capital. They aspire to cultivate the remarkable and difficult capacity to regard oneself from the perspective of the other, which is the foundation of the critical interaction necessary for active and effective citizenship. . . . In the United States, . . . racial and ethnic identities mark lines of intense political division. If the racial and ethnic rifts that divide us are to be transcended by a democratic state that is legitimate to all sides, there must be articulate participation in public culture that concomitantly spans the lines of these controversies.").
59. Pascarella & Terenzini, *supra* note 31, at 279.
60. Gurin, *supra* note 12, at 101.
61. See Astin, *supra* note 37, at 46–49.
62. Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in this volume.
63. William G. Bowen & Derek Bok, The Shape of the River 225 (1998).
64. Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in this volume. See also Marvin P. Dawkins & Jomills Henry Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 3 Journal of Negro Education 394 (1994).
65. James L Werth & Charles G. Lord, *Previous Conceptions of the Typical Group Member and the Contact Hypothesis*, 13 Basic & Applied Social Psychology 351 (1992). See also Gordon Allport, The Nature of Prejudice (1954) (proposing the contact hypothesis).
66. See Werth & Lord, *supra* note 64, at 352; Donna M. Desforges et al., *Effects of Structured Cooperative Contact on Changing Negative Altitudes Toward Stigmatized Social Groups*, 60 Journal of Personality & Social Psychology 531 (1991); Janet Ward Schofield, *Improving Intergroup Relations Among Students*, *in* Handbook on Research on Multicultural Education 635, 638–41 (James A. Banks, ed., 1995).
67. *Wygant*, 476 U.S. at 315 (Stevens, J., dissenting) (emphasis added). Some commentators seek to distinguish this *sameness* argument from the *difference* argument for promoting racial diversity. See, for example, Joanne Trautmann Banks, *Foreword*, *in* Trials, Tribulations, and Celebrations: African-American Perspectives on Health,

Illness, Aging, and Loss xv–xvi (Marian Gray Secundy, ed., 1992). But I see the two as inherently linked. Persons of different races likely have some differences that are real, based on their different cultures and experiences, and others that are based on misperceptions from which our sameness can emerge. But the point is that it does not matter to which theory one subscribes because racial diversity likely promotes civic values among all students in either case. Therefore, this goal for affirmative action cannot be said to turn on the relationship between race and viewpoint.

68. See *Metro*, 497 U.S. at 602 (O'Connor, J., dissenting).
69. See, for example, Milem, *supra* note 18, at 14 ("Colleges must find ways for students to communicate regularly across communities of difference so that they are able to develop fully the crosscultural competencies identified by corporate representatives as being essential to the global competitiveness of their organizations.").
70. Bowen & Bok, *supra* note 63, at 223.
71. See, for example, Secretary's Commission on Achieving Necessary Skills, What Work Requires of Schools: A SCANS Report for America 2000 (1991).
72. See, for example, Poppy Lauretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 Small Group Research 248 (May 1996).
73. See, for example, Dawkins & Braddock, *supra* note 64, at 394.
74. Kermit Daniel, Dan A. Black, & Jeffrey Smith, *Racial Differences in the Effects of College Quality and Student Body Diversity on Wages*, in this volume.
75. See id.
76. See, for example, Miriam Komaromy et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 New England Journal of Medicine 1305 (May 16, 1996).
77. Id. at 1307.
78. For example, id.; S. N. Keith et al. *Effects of Affirmative Action in Medical Schools: A Study of the Class of 1975*, 313 New England Journal of Medicine 1519–25 (1985).
79. Timothy Ready, *The Impact of Affirmative Action on Medical Education and the Nation's Health*, in this volume.
80. See *Bakke*, 438 U.S. (opinion of Powell, J.).
81. See, for example, *One Statistical Measure of How a College Education Tends to Repair Damage From the Past*, Journal of Blacks in Higher Education 5 (Autumn 1996) (reporting that the median annual income of black high school graduates is approximately 57 percent of white high school graduates, but the income of black *college* graduates is 87 percent of white college graduates). "Whatever the reasons for the continuing economic disparities between the races, it is certain that a college education, more than any other factor, serves to break down racial stereotypes, increase opportunities for African Americans, and decrease the economic gap between blacks and whites." Id.
82. Daniel, Black, & Smith, *supra* note 74. Most important in the context of affirmative action, studies show that minority students who attend selective universities, including those admitted as a result of affirmative action, have higher future earnings than equally qualified minority students who attend less prestigious universities. For example, Kane, *supra* note 3, at 13–14.
83. For example, Sterling M. Lloyd & Russell L. Miller, *Black Student Enrollment in U.S. Medical Schools*, 261 Journal of the American Medical Association 272 (1989) ("Blacks continue to be underrepresented in the medical schools of this country and in the profession of medicine. Blacks represent about 12% of the nation's population, but only 6% of total medical school enrollment, 5% of medical school graduates, 5% of postgraduate trainees, 3% of physicians in practice, and of medical school faculties.").

84. See id. For example, there is evidence that black patients are more likely to visit black physicians. This is true even after controlling for the proportion of black residents living in the given community. Komaromy et al., *supra* note 76, at 1301–08. Thus, increasing the number of black physicians could lead to an increase in preventive care and early detection of illness as more black patients would more readily seek medical attention. Furthermore, black physicians may be more likely to understand "the cultural and social context of illness and disability among blacks" and to communicate effectively with black patients regarding those issues. Lloyd & Miller, *supra* note 83. See also Clovis E. Semmes, Racism, Health, and Post-Industrialism: A Theory of African-American Health 1310–34 (1996).
85. See *Bakke*, 438 U.S. at 3 10–11 (opinion of Powell, J.) (indicating that the state's interest in "facilitating the health care of its citizens" is potentially compelling).
86. See, for example, id. at 307–10 (opinion of Powell, J.) (holding that the interest in overcoming societal discrimination is insufficient to justify affirmative action by a university).
87. For example, in *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 65 USl W 3416 (1997), the Seventh Circuit upheld an affirmative action program for black correctional officers at a juvenile "boot camp" to promote the state's compelling interest in the "pacification and reformation" of youth offenders. Imagine that instead of the boot camp seeking to promote a black officer directly, a local university sought to enroll a black applicant in its correctional-officer training program. In that case, there would perhaps be an argument that, given the state's compelling interest in having some black correctional officers in supervisory positions, the university program would pass strict scrutiny.
88. Zelikow, *supra* note 5, at 162–64.
89. When talking about numbers, it is obviously important to distinguish between targets and quotas. The use of quotas in affirmative action is clearly unconstitutional, See, for example, *Bakke*, 438 U.S. at 314–20, in part because using a quota encourages the requirement of enough minorities to fill the quota regardless of qualifications, See Amar & Katyal, *supra* note 21, at 1751. Numerical targets are intended to be more flexible and aspirational. Numerical targets in affirmative action establish the ideal while recognizing that meeting the targets depends on the availability of qualified minority applicants.
90. See, for example, *Bakke*, 438 U.S. at 307–10 (opinion of Powell, J.) ("[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. This is a step we have never approved.").
91. See, for example, Chin, *supra* note 38, at 921 ("Diversity proponents often argue that a 'critical mass' of minority students is necessary to ensure that the students are socially comfortable."). For example, there is evidence that black students attending predominantly white universities experience greater levels of alienation and isolation than their white counterparts at predominantly white universities or their black counterparts at historically black universities. See, for example, Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 Harvard Educational Review 26 (Spring 1992); Pascarella & Terenzini, *supra* note 31, at 380. Also,

there is evidence that the social and academic adjustment of black students at predominantly white universities is enhanced by communalism, meaning the tendency for a black student to see him/herself as part of a black community. Chalmer E. Thompson & Bruce R. Fretz, *Predicting the Adjustment of Black Students at Predominantly White Institutions,* 62 Journal of Higher Education 437, 437–38 (July/Aug. 1991) ("The communal student may be more likely to draw from the support of Blacks on campus or in the surrounding community, thereby uniting with community members in the face of adversity rather than withdrawing in isolation.").

92. Importantly, recent studies indicate that a critical mass of minority students will not necessarily result in self-segregation. See, for example, Troy Duster, *The Diversity of California at Berkeley: An Emerging Reformulation of "Competence" in an Increasingly Multicultural World, in* Beyond a Dream Deferred 231, 237 (1993) ("Our research revealed that while the student body is segmented along racial and ethnic lines, there are some important, good social relations and collective problem solving across racial and ethnic lines."); Sylvia Hurtado, Eric L. Dey, & Jesus G. Trevino, *Exclusion or Self-Segregation? Interaction Across Racial/Ethnic Groups on College Campuses* (Paper presented at the Annual Meeting of the American Educational Research Association) (1994) (finding that, in terms of informal interactions, "African Americans are more likely to interact across groups than are whites."). Cross-racial interaction will occur as long as universities seek to promote such cross-racial interaction. In other words, in addition to numbers, "the results of efforts to increase diversity on our campuses may depend very much on what kinds of learning environments are created." Bowen, *supra* note 20, at 21.
93. Chang, *supra* note 36.
94. Compare Amar & Katyal, *supra* note 21, at 1777 (supporting nonremedial affirmative action) ("A critical mass of students of a particular group may be needed so that other students become aware of the group (and of the diversity within the group), but this by no means requires exact proportionality—or anything like it.") and Chin, *supra* note 38, at 894 (opposing nonremedial affirmative action) ("The theory of Bakkean diversity is that it may be beneficial for persons who are not members of a particular group to have contact with others who are. Accordingly, the number of minority students admitted is driven not by the percentage of minorities in the population, but by the number needed to achieve that goal of educational diversity."). See also Gudeman, *supra* note 40 ("When evaluating classroom experiences, faculty reported that diversity enhanced desired educational outcomes more successfully when the representation of diverse groups went beyond that of a solo or token presence.").
95. Some education leaders and researchers are exploring admissions formulas that promote racial diversity using facially race-neutral criteria. See, for example, Linda F. Wightman, *The Threat to Diversity* in *Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions,* 72 New York University Review of Law 48 (1997). Yet existing data indicate that the use of facially race-neutral factors, such as social class, in university admissions is not likely to yield a racially diverse student body at some highly selective universities. For example, Robert Bruce Slater, *Why Socioeconomic Affirmative Action in College Admissions Works Against African Americans,* Journal of Blacks in Higher Education 57–59 (Summer 1995) (showing that using socioeconomic status in admissions at selective universities would result in little more racial diversity than a race-blind system that did not include socioeconomic status); Wightman, *supra* note 95, at 48–59 (finding that neither socioeconomic status, selectivity of undergraduate school, or undergraduate major if used as factors in law school admissions would

result in racial diversity similar to that presently achieved under affirmative action); Kane, *supra* note 3, at 17–19 (finding that because the majority of low-income families are white, a college presently administering a race-based affirmative action admissions plan would have to "grant preferences to six times as many low-income students to 'yield' the same number of black and Hispanic freshmen"). ("No race-blind substitute is likely to cushion the effect of an end to racial preferences. The problem is one of numbers."). Some states have recently adopted "percentage plans" for college admission, but such plans are beyond the scope of this chapter.

96. Even if the effect of such a program was to increase racial diversity, it would not be subject to strict scrutiny because it was not facially or intentionally race-based. See, for example, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (upholding a Massachusetts veterans' preference policy even though the legislature was fully aware that the policy would have a discriminatory effect on women).
97. Possible race-neutral means for achieving these goals may include incorporating multicultural ideas into the curriculum and/or formalizing efforts to promote racial ethics. Therefore, universities may have to present evidence that such race-neutral efforts are not likely to be effective in racially homogeneous compared to racially diverse environments. To the extent that such race-neutral means are likely to be even partially successful, the Court may look more favorably on the use of affirmative action if those race-neutral means are used in tandem with race-based means. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 589–590 n.3 (citing with approval the FCC's prior and continued use of race neutral means to achieve its goals).
98. See, for example, Slater, *supra* note 95, at 57 ("[I]f admissions at [the nation's most prestigious universities] were made on the basis of grade point average and SAT scores, and without regard to race, perhaps 1 percent or 2 percent of all students accepted for admission to these schools would be black."); Wightman, *supra* note 95, at 19–27 (showing that minority admissions to ABA accredited law schools would decrease significantly if only race-neutral criteria were used); Bowen, *supra* note 20, at 19 (finding that the use of exclusively race-blind criteria at selective universities would reduce black enrollment from approximately 8 percent to 2 percent).
99. *Bakke*, 438 U.S. at 315 (opinion of Powell, J.).
100. Kane, *supra* note 3, at 8–9.
101. Id.
102. See, for example, Bowen, *supra* note 20, at 10.
103. See, for example, *Citizens Commission on CAW Rights*, The Resource: An Affirmative Action Guide 9A (1996) (indicating that the University of California at Los Angeles (UCLA) considers not fewer than 17 factors in its admissions process).
104. See, for example, John Larew, *"Who's the Real Affirmative Action Profiteer?" in* Debating Affirmative Action 247, 250 (Nicolaus Mills, ed., 1994) ("At most elite universities during the eighties, the legacy was by far the biggest piece of the preferential pie.").
105. See, for example, Daryl G. Smith, *Organizing for Diversity: Fundamental Issues, in* Handbook of Research on Multicultural Education 532 (James A. Banks, ed., 1995) ("On many campuses across the country, the challenges of creating an organization that embraces diversity so that it can truly begin to educate all students has begun.").
106. Jeffrey F. Milem, *Increasing Diversity Benefits: How Campus Climate and Teaching Methods Affect Student Outcomes*, in this volume.

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107. See, for example, Institute for the Study of Social Change, Diversity Project: Final Report, University of California at Berkeley 18–19, 40 (November 1991) ("Data . . . suggest that while *both* African-American and white freshman students want more inter-racial experiences and contacts, *they want them on different terms*. African-Americans want more classes and programs and institutional responses. Whites want more individual, personal contacts developed at their own time and leisure. . . . The task is to provide all students with a range of safe environments and options where they can explore and develop terms which they find comfortable for inter-ethnic/cultural contact.").
108. See Liu, *supra* note 13, at 406–10.

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